87-615

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MELISSA DETSEL, an infant by her mother and next friend, MARY JO DETSEL,

Petitioner,

—v.—

BOARD OF EDUCATION OF THE AUBURN ENLARGED CITY SCHOOL DISTRICT, PETER KACHRIS, individually and as Superintendent of the Auburn Enlarged City School District, GORDON AMBACH, Commissioner of the New York State Education Department,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. In an action under The Education of All Handicapped Children Act and regulations promulgated thereunder, did the Court of Appeals err in creating an *ad hoc* balancing test to determine whether the services of a nurse, necessary for a child to attend school, are "related services" and not exempt as "medical services", rather than applying the bright line test contained in the regulations as applied by this Court which provide that handicapped children are entitled to receive such services so long as they can be performed by a school nurse and not by a physician?

2. Did the Court of Appeals err in holding that a school district may properly refuse to provide school nursing services to a handicapped child where the child will, contrary to the fundamental purpose of the Act and decisions of this Court, be relegated to instruction at home away from other children, and where the cost of providing teachers and other services at the child's home as required by the Act will exceed the cost of providing nursing services in school?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceeding.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, which affirmed an order of the United States District Court for the Northern District of New York denying petitioner's motion for summary judgment, granting respondents' motions for summary judgment and dismissing the action.

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Second Circuit (App. 1a)[1] is reported at 820 F.2d 587 (2d Cir. 1987).

The opinion of the United States District Court for the Northern District of New York (App. 3a) is reported at 637 F. Supp. 1022 (N.D.N.Y. 1986).

[1] References to "App." are to the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1987. By order of this Court dated September 3, 1987, the time to file this petition was extended to and including October 13, 1987. (App. 14a). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved in this proceeding are The Education of All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.*; 34 C.F.R. § 300.13 (1987); 34 C.F.R. §§ 300.500-556 (1987). (App. 15a-21a).

STATEMENT OF THE CASE

This is an action arising out of the failure by Respondent-The Board of Education of the Auburn Enlarged City School District (the "School District") to fulfill its obligation under The Education of All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.* (the "EAHCA" or the "Act") and regulations promulgated thereunder by the United States Department of Education (the "Regulations"), to provide for nursing services required by a handicapped child in order to attend school. As a result of the School District's refusal to carry out its responsibilities, Melissa Detsel, a bright nine-year old handicapped child, will be confined to her home. Contrary to the fundamental purpose of the EAHCA, she — and hundreds of children like her — will thus be deprived of the benefits of interaction with other handicapped and nonhandicapped children.[2]

In *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), this Court held that nursing services must be provided upon a showing that (1) the service is required to assist a

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[2]The Office of Technology Assessment estimates that between 680 and 2000 children have potentially the same needs as Melissa. Office of Technology Assessment, *Technology Dependent Children: Hospital Care v. Home Care* (1987) at p. 31.

handicapped child to benefit from special education; and (2) the service is not excluded as a "medical service," defined in the Regulations as certain services which must be provided by a physician. Holding that the Regulations should be afforded deference, this Court further found that the definition of "medical services" therein excluded only services which must necessarily be provided by a physician – not by a school nurse or other qualified person.

There is no dispute under the first prong of the *Tatro* test that the health care services involved in this case are required to assist Melissa to benefit from special education. Respondents conceded, and the District Court held, that without these supportive services Melissa would not be able to attend school and could not receive the benefits of the special education program designed for her. There is also no dispute, as Respondents have further conceded, that the services required by Melissa are within the competence and expertise of a school nurse, and that they need not be performed by a physician.

The principal issue presented for review is whether the Court below applied the correct standard in determining that the nursing services required by Melissa are "medical services" and thus excluded from the EAHCA, even though the services were unquestionably within the competence and expertise of a school nurse. Instead of applying the clearcut criteria contained in the Regulations and employed by this Court in *Tatro*, the Second Circuit adopted a "balancing test" to determine whether nursing services are "medical services." Under the novel test fashioned by the Second Circuit, an *ad hoc* examination of such factors as whether the services are "complex" or "intermittent," among other individual circumstances, is required to determine whether they should properly be excluded as "medical services." Contrary to the Regulations and this Court's decision in *Tatro*, the level of expertise of the provider of the services is not even the predominant, let alone the dispositive, factor to be weighed in the balancing test endorsed by the court below. Petitioner respectfully submits that the decision by the Second Circuit presents conflicts with this Court and other Circuits, raises

important questions of federal law and statutory construction, and will lead to uncertainty, protracted litigation and conflicting results in both administrative and judicial forums.

In addition, the Second Circuit failed improperly to take into account the fundamental purpose of the Act which is, as this Court recognized in *Board of Education v. Rowley*, 458 U.S. 176 (1982), to educate handicapped children with non-handicapped children whenever possible. The anomalous result of the decision below is that Melissa will receive instruction by one or more teachers at her home, at a cost to respondents that will exceed the cost of providing nursing services in school. By relegating the child to home instruction and depriving her of interaction with other children for no rational purpose, the decision below frustrates the accomplishment of the Act's primary goal.

A. *The Facts*

Melissa is a bright nine-year old physically handicapped child with an incomplete diaphragm and an abnormally developed lung. She breathes with the assistance of a ventilator through a tracheostomy and is fed and receives medication through a gastrostomy and jejunostomy tube.

Her conditions require respiration and feeding assistance, frequent monitoring of her respiratory status, including the administration of oxygen. Because of the potential for congestive heart failure, a nurse must be available to provide cardiopulmonary resuscitation, if necessary. It is undisputed that while each element of this assistance may not ordinarily be administered by a layman, the care can be provided by a licensed practical nurse ("LPN") or a registered nurse ("RN"), such as the nurse employed by the School District. The expertise of a physician is not required.

As a result of the decision below, Melissa will be confined to her home and deprived of the educational benefits associated

with her interaction with other children.[3] The Medicaid program for which she is eligible will provide for nursing care at her home (but not at school), and the School District has acknowledged its obligation to provide one or more teachers and therapists in Melissa's home. The School District has further acknowledged that the costs of providing educational services to Melissa at home exceed the cost of providing for nursing services in school.

B. *The Administrative Hearings*

When petitioner was first notified that the nursing services would be terminated, she requested an impartial hearing. After two days of testimony by seven witnesses, the hearing officer entered an order directing respondents to "provide a suitably trained person to attend to [Melissa's] needs while [attending] a special education class." He concluded that application of *Tatro*, and the relevant provisions of the EAHCA and regulations, required respondents:

> to provide appropriate supportive services to meet both the routine as well as the potentially life threatening needs exhibited by Melissa Detsel, provided that the needs can be met without a physician, so that she will be able to continue to attend the public school program prescribed [by the school district's committee on the handicapped].

Respondent-School District appealed to the New York State Commissioner of Education who reversed the hearing officer's decision.

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[3] Since Melissa has begun to attend school, she has interacted regularly with non-handicapped children in recreational activities and in the classroom. Her treating physician attributed her rapid acceleration of speech, communication and social skills directly to her ability to interact with other children.

C. *The Proceedings in the District Court*

Petitioner instituted this action in the United States District Court for the Northern District of New York seeking an order requiring, among other things, Respondent-The School District to provide nursing care while Melissa attended school. All parties moved for summary judgment, and there are no material facts in dispute.

Conceding that the services required by Melissa could be performed competently by a school nurse, respondents contended that the nursing services fell within the "medical services" exclusion. As set forth in the District Court's opinion, respondents urged the court "to ignore the technical distinction in the Regulations which would exclude therapeutic services when performed by a physician but would not exclude services of this type when performed by a school nurse or other qualified person." (App. 9a). Respondents maintained that instead of the bright line provision contained in the Regulations, which turns on the qualifications of the provider of the services, an *ad hoc* inquiry into the nature, extent and complexity of the services was required to determine whether the exclusion applied. In June, 1986, the District Court denied petitioner's motion for summary judgment, awarded summary judgment for respondents and dismissed the action.

In its analysis, the District Court departed from the textual requirements of the EAHCA and the Regulations. It found that notwithstanding the language of the Regulations, the qualifications of the provider of the services had no bearing upon its determination. The District Court held that the nursing services required by Melissa "more closely resemble" the "medical services specifically excluded" from the Act. It noted explicitly that "even though the services do not fulfill the 'physician' requirement set forth in [the Regulations], the exclusion of the disputed services is in keeping with its spirit." (App. 12a).

D. *The Court of Appeals Decision*

The Second Circuit affirmed the judgment of the District Court. In a *per curiam* opinion, it adopted the unprecedented

ad hoc balancing test applied by the District Court and concluded that "in all the circumstances, the district court gave proper effect to the statutory scheme in balancing the interests of the parties." (App. 2a). The opinion made no mention of this Court's decision in *Tatro*, and failed to address the "mainstreaming" requirement of the EAHCA which, as this Court held in *Board of Education v. Rowley*, 458 U.S. 176, 202 (1982), "requires participating States to educate handicapped children with nonhandicapped children whenever possible."

In its decision, the Second Circuit cited only to the decision by the Ninth Circuit in *Department of Education v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983), *aff'g in relevant part* 531 F. Supp. 517 (D. Haw. 1982), *cert. denied*, 471 U.S. 1117 (1985), which ordered a school board to provide nursing services. The court attempted to distinguish the Ninth Circuit's decision under its balancing test, finding that the services at issue in that case were "intermittent, not constant," and did not require "as much expertise." (App. 2a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS ON THE STANDARD TO APPLY IN DETERMINING WHETHER SCHOOL NURSING SERVICES MUST BE PROVIDED TO HANDICAPPED CHILDREN AND PRESENTS IMPORTANT ISSUES OF FEDERAL LAW AND STATUTORY CONSTRUCTION

Congress enacted the EAHCA in 1975 in light of the "[i]ncreased awareness of the educational needs of handicapped children and landmark court decisions establishing the right to education for handicapped children." S. Rep. No. 168, 94th Cong., 1st Sess. 5, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1425, 1429. With respect to the objective of ensuring that

handicapped children are educated in a regular environment, the legislative history of the Act provides:

> [W]hile instruction *may take place in such locations as* classrooms, *the child's home*, or hospitals and institutions, the delivery of such instruction must take place in a manner consistent with the requirements of law which provide that *to the maximum extent appropriate handicapped children must be educated with children who are not handicapped*, and that handicapped children should be placed in special classes, separate schooling, or any other educational environment only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and supportive services cannot be achieved satisfactorily.

S. Rep. No. 455, 94th Cong., 1st Sess. 30, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1480, 1483 (emphasis supplied). To insure that handicapped children are able to attend school, the Act includes a wide range of "related services," which are defined as:

> transportation, and such developmental, corrective, and other *supportive services* (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and *medical* and counseling services, *except that such medical services shall be for diagnostic and evaluation purposes only)* as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapped conditions in children.

20 U.S.C. § 1401(17) (emphasis supplied). The term "related services" is defined explicitly in the Regulations as a term that "also includes school health services." 34 C.F.R. §§ 300.13(a) (1987). In turn, "school health services" are defined to mean "services provided by a *qualified school nurse or other qualified person*." 34 C.F.R. § 300.13(b)(10) (1987) (emphasis supplied).

The Regulations expressly distinguish between services provided by physicians and by school nurses or other qualified persons. The term "medical services," which are excluded from Section 1401(17) of the Act, are defined in the Regulations as "services provided by a licensed physician." 34 C.F.R. § 300.13(b)(4) (1987). The statutory and regulatory scheme is thus simple. When health care services are required in order for the child to attend school, a school district must provide them unless the required service can only be performed by a physician.

A. A Balancing Test Fundamentally Conflicts with the Applicable Regulations and *Tatro*

In *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), this Court applied the Regulations according to their terms in determining whether the school district was obligated to provide as a "related service" a procedure known as clean intermittent catheterization, required by the handicapped child every three or four hours to avoid injury to her kidneys. This Court held:

> The regulations define "related services" for handicapped children to include "school health services" which are defined in turn as "services provided by a qualified school nurse or other qualified person." "Medical services" are defined as "services provided by a licensed physician." Thus, the Secretary [of Education] has determined that the services of a school nurse . . . are not subject to exclusion as a "medical service," but that the services of a physician are excludable as such.

468 U.S. at 892 (citations omitted).[4]

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[4] In response to the school district's fears that this construction of the Regulations could require it to provide for every necessary life support system, this Court further identified three limitations embodied in the legislative scheme. First, in order to be entitled to receive the service, the child must be handicapped as defined by the EAHCA and regulations. Second, the service must be necessary to aid a handicapped child to benefit from special education.

(Footnote Continued)

In conflict with this standard, the Second Circuit concluded that the district court "gave proper effect to the statutory scheme in balancing the interests of the parties." (App. 2a). The novel and amorphous "balancing test" endorsed by the Second Circuit directly conflicts with the plain wording of the applicable statutory and regulatory provisions as applied in *Tatro*. The Second Circuit virtually ignored the bright line test contained in the Regulations which do not refer to such individualized, *ad hoc* determinations. As this Court held in *Tatro*, the "Secretary [of Education's determination] that the services of a school nurse . . . are not subject to exclusion as a 'medical service,' but that the services of a physician are excludable as such" reasonably reflects Congress' intent and therefore must be given deference. *Tatro*, 468 U.S. at 892. By eliminating the qualifications of the provider as the determinent factor, the Second Circuit failed to defer to the regulations promulgated by the Department of Education in further conflict with the decision of this Court.

Moreover, even an application of the balancing test endorsed by the Second Circuit reveals not a single legitimate interest of respondents in refusing to provide nursing services to Melissa. Respondents have acknowledged their responsibilities under the EAHCA to provide one or more *teachers* for Melissa at her *home* where the Medicaid program for which Melissa is entitled will provide for nursing care. They have also acknowledged that the cost of providing such educational services at Melissa's home will *exceed the cost* of providing *nursing* services *in school*. In "balancing" the interests of the parties, there is no countervailing factor based on cost savings or otherwise that can even be placed on the scale. In the absence of any competing interest,

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If the treatment or medication could be given during non-school hours, then the school district is not required to provide the service, even if the burden would be minimal. Third, the service need only be provided if it can be performed by a nurse or other person, not a physician. Given these inherent limitations, this Court made clear that its holding would not open the door to requiring a full range of services that might otherwise be argued to constitute "related services." 468 U.S. at 894.

respondents have no basis to refuse to provide the necessary services even under the balancing test applied by the court below.[5]

B. The Balancing Test Applied by the Second Circuit is in Apparent Conflict with the Standard Applied by the Ninth Circuit

The balancing approach followed by the Second Circuit is also in apparent conflict with the decision by the Ninth Circuit in *Department of Education v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983), *aff'g in relevant part* 531 F. Supp. 517 (D. Haw. 1982), *cert. denied*, 471 U.S. 1117 (1985). In *Katherine D.*, the Ninth Circuit properly drew the distinction between "medical services" that must be performed by a physician, and services that can be provided by a nurse or other trained person. Accordingly, it required defendants to provide nursing services which were almost identical to the services at issue in this lawsuit. In that case, the handicapped child required a tracheostomy tube to breathe and expel secretion from her lungs. Her disease caused mucus to accumulate in her lungs, making her susceptible to recurrent pulmonary infections. Because of this condition, the child needed assistance in order to suction her lungs through her tracheostomy tube. Even more critically, she required a person trained to provide emergency care in the event that the tube became dislodged while she was attending school.

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[5] Even if cost were a factor, which here it is not, costs for nursing care are far less burdensome than other costs that the Act routinely requires. *E.g.*, *Clevenger v. Oak Ridge School Bd.*, 744 F.2d 514 (6th Cir. 1984) (requiring residential placement in private institution where necessary to a handicapped child's education); *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), *cert. denied sub nom. Scanlon v. Battle*, 452 U.S. 968 (1981) (requiring year round schooling for handicapped children who could not progress if educated for the 180 school day period provided for other children). The Act requires participants "to provide a comprehensive range of services to accomodate a handicapped child's educational needs, regardless of financial and administrative burdens." *Kruelle v. New Castle County School Dist.*, 642 F.2d 687, 695 (3d Cir. 1981).

The district court held that these services — the administration of medication, the use of specialized equipment to suction excess mucus and access to a person trained to handle emergency problems with her tracheostomy — were each "EAHCA-mandated related services." 531 F. Supp. at 526. Concluding that these services "can be provided by a nurse or other trained person who need not be a physician", the court found that "this help is within the definition of related services (e.g., because it is a school health service) or is, in any event, not the type of medical assistance which is excludable from the definition of 'related services.' " *Id.*[6] In affirming the district court's decision, the Ninth Circuit held that "[t]hese services could have been provided by a 'school nurse or other qualified person,' and thus fall squarely within the requirements of the Act." 727 F.2d at 815.

The Second Circuit's attempt to square its holding with the Ninth Circuit by drawing minute factual distinctions does not eliminate the conflict in approach between the two decisions. It serves, however, to illustrate the divergent results that will flow from a "balancing test" as opposed to the test contained in the Regulations. Even though the tracheal suctioning and monitoring services were virtually identical to the services required by Melissa, the Second Circuit found the Ninth Circuit's decision "unpersuasive" since the care required in that case was "intermittent, not constant," and "did not require as much expertise." (App. 2a). This effort to reconcile the holdings does not and cannot cure the fundamental conflict between the standards applied by each court. That conflict arises from the divergent standards themselves, not by their application. In *Katherine D.*, the Ninth Circuit found the qualifications of the provider as the cornerstone of the standard it applied, while the "balancing test" applied by the Second Circuit did not even take that critical factor into account.

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[6] Other courts have recognized the distinction between care by a physician and other professionally trained individuals. *Tokarcik v. Forest Hills School Dist.*, 665 F.2d 443, 455 (3d Cir. 1981), *cert. denied sub nom. Scanlon v. Tokarcik*, 458 U.S. 1121 (1982); *Doe v. Anrig*, 651 F. Supp. 424, 431 n.6 (D. Mass. 1987); *Antkowiak v. Ambach*, 653 F. Supp. 1405, 1416 (W.D.N.Y. 1987).

C. The Novel Balancing Test Adopted by the Court Below Will Lead to Inconsistent Results in Both Administrative and Judicial Proceedings and Will Generate Protracted Litigation, Unlike the Regulatory Standard Applied in *Tatro*

Application of a "balancing test", requiring a detailed *ad hoc* examination of individual questions such as the nature, extent, complexity and cost of nursing services, will seriously undermine the uniformity of results promoted by the regulatory standard applied in *Tatro* and other courts. Because the test necessarily involves scrutiny of a variety of facts underlying each case, it will inevitably generate uncertainty in the administrative process and lead to protracted litigation and delay in an area of federal concern.

Bevin H. v. Wright, No. 86-1830 (W.D. Pa. August 4, 1987), provides a recent illustration of the uncertainty and delay that will be created by the balancing test. That case, decided within two months of the Second Circuit's decision, reveals that no recognizable standard has emerged as a result of the adoption of the balancing test. In applying this test, the district court found the nursing services "complicated," "extensive," "constant" and "costly" and held that they need not be provided. With such vague formulations guiding courts and administrators, uniformity and consistency cannot be expected, and their *ad hoc* determinations will lead to inevitable delay.

In addition, the court in *Bevin H.* expressly noted that, in its view, the definition of "related services" is subject to "still developing case law." Slip op. at 1. Petitioner respectfully submits that *Tatro* is dispositive, and that the standard used by this Court does not require, and should not be susceptible to, further case law construction. The implication of the Second Circuit's decision and *Bevin H.* is, however, inescapable. By inviting courts to engage in individualized scrutiny of any number of factors they might deem relevant, the entire process will delay the provision of related services to handicapped children at times most critical for their interaction with peers.

The absence of clearcut criteria poses difficulties not only for courts, but also for school administrators and parents who are encouraged to work cooperatively. *See, e.g.*, 34 C.F.R. § 300.504 (1987). In addition, the balancing test will require extensive testimony, including expert testimony, concerning such matters as a comparison of the complexity of the service at issue to those which have been held to be related services. In contrast, under the regulatory standard, the sole issue is whether the service can be provided by a school nurse or qualified person other than a physician. The Second Circuit's displacement of this clearcut regulatory standard is an important area of federal concern and warrants review by this Court.

II. THE SECOND CIRCUIT'S EXPANDED DEFINITION OF THE MEDICAL SERVICES' EXCLUSION CONFLICTS WITH THIS COURT'S ANALYSIS IN *ROWLEY* AND UNDERMINES THE STATUTORY MANDATE TO PROVIDE AN EDUCATION IN A REGULAR SCHOOL ENVIRONMENT WHENEVER POSSIBLE

The decision below also undermines the fundamental purpose of the EAHCA to provide an education in a regular school environment. It failed to take into account the analysis in *Board of Education v. Rowley*, 458 U.S. 176, 202 (1982), where this Court reviewed at length the statutory history of the Act and concluded that "[t]he Act requires participating States to educate handicapped children with nonhandicapped children whenever possible."

A handicapped child must be educated in a regular school environment unless "the nature of the handicap is such that education in regular classes with the use of supplementary aids 'cannot be achieved satisfactorily.' " *Espino v. Besteiro*, 520 F. Supp. 905, 911 (S.D. Tex. 1981) (citations omitted) (emphasis supplied); *see Tatro v. Texas*, 625 F.2d 557, 563 n.15 (5th Cir. 1980); *Tokarcik v. Forest Hills School Dist.*, 665 F.2d 443, 456 (3d Cir. 1981), *cert. denied sub nom. Scanlon v. Tokarcik*, 458 U.S. 1121 (1982) (citations omitted). No such showing was or can be made.

Any interpretation of a statutory exception to the general rule requiring supportive services to be provided, 20 U.S.C. § 1401(17), and to the specific inclusion of school health services as a supportive service, must be made within the context of the underlying statutory command to educate handicapped children in the "least restrictive environment." The EAHCA requires that "to the maximum extent appropriate, handicapped children . . .are educated with children who are not handicapped." 20 U.S.C. § 1412(5). It specifically requires the states to assure that "removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes *with the use of supplementary aids and services* cannot be achieved satisfactorily." *Id.* (emphasis added). Thus the statute recognizes the role of supportive services in ensuring compliance with the mandate for education in the least restrictive environment.

The implementing Regulations similarly emphasize the importance of education in the "least restrictive environment." 34 C.F.R. §§ 300.550-556 (1987). They require that "[u]nless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped." 34 C.F.R. § 300.552(c) (1987). When the severity of the handicap is such that the child requires a separate classroom for handicapped children, the participation of the handicapped child with the nonhandicapped in nonacademic settings, such as extracurricular activities, is required. 34 C.F.R. § 300.553 (1987) (and comment thereto).

Home education, to which petitioner and other severely handicapped children will be relegated if respondents prevail, is the most restrictive form of education. *See e.g.*, New York City Board of Education, *Educational Serv. for Students with Handicapping Conditions* (1985) at p. 21. The child is not only isolated from nonhandicapped children, she is removed from all contact with any children in the educational process. This result must be placed in the context of available alternatives. Where, as here, the child will be relegated to home instruction, with the school district providing teachers at home at greater cost than providing nurse care in school, that result is plainly irrational.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
October 13, 1987

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APPENDIX

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Opinion of the Court of Appeals
for the Second Circuit

Melissa DETSEL, an Infant, by her mother and next friend Mary Jo DETSEL, Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF the AUBURN ENLARGED CITY SCHOOL DISTRICT, et al., Defendants-Appellees.

No. 1262, Docket 86-7619.

United States Court of Appeals,
Second Circuit.

Argued June 11, 1987.

Decided June 12, 1987.

Appeal from a judgment of the United States District Court for the Northern District of New York, Neal P. McCurn, Judge, see 637 F.Supp. 1022 (1986), dismissing complaint seeking to compel school district to provide nursing services for handicapped child under Education of All Handicapped Children Act, 20 U.S.C. § 1401 et seq.

Anne W. Crawford, New York City (Skadden, Arps, Slate, Meagher & Flom, Herbert Semmel, New York Lawyers for the Public Interest, New York City, Legal Services of Central New York, Syracuse, N.Y., on the brief), for plaintiffs-appellants.

Edward C. Hooks, Ithaca, N.Y. (James Charles Holahan, Treman & Clynes, Harris, Beach, Wilcox, Rubin and Levey, Ithaca, N.Y., on the brief), for defendants-appellees Bd. of Educ. of the Auburn Enlarged City School Dist. and Peter Kachris.

Seth Rockmuller, Albany, N.Y. (James H. Whitney, Albany, N.Y., on the brief), for defendant-appellee Com'r of Educ.

Norman H. Gross, Albany, N.Y., filed a brief for New York State School Boards Ass'n as amicus curiae on behalf of defendants-appellees.

Before VAN GRAAFEILAND, KEARSE and MAHONEY, Circuit Judges.

PER CURIAM:

Plaintiff Melissa Detsel, a severely handicapped child, suing by her mother and next friend Mary Jo Detsel, appeals from a final judgment of the United States District Court for the Northern District of New York, Neal P. McCurn, *Judge*, dismissing her complaint seeking to compel defendants Board of Education of the Auburn Enlarged City School District, *et al.*, to provide her with nursing services pursuant to the Education of All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.* (1982). We conclude that the complaint was properly dismissed for the reasons stated in the opinion of the district court, reported at 637 F.Supp. 1022 (1986).

We are unpersuaded by plaintiffs' argument that the district court gave insufficient deference to the decision in *Department of Education v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983), *aff'g in relevant part*, 531 F.Supp. 517 (D.Haw. 1982), *cert. denied*, 471 U.S. 1117, 105 S.Ct. 2360, 86 L.Ed.2d 260 (1985), which ordered a school board to provide nursing services. Plaintiffs acknowledge that Melissa needs a full-time person trained to monitor her respiratory status "constantly" and to assist her with her physical needs while she attends school, and that the service must be provided by "at least a licensed practical nurse" and "cannot be adequately provided by a regular school nurse who must care for other children." (Plaintiff's Statement of Facts Pursuant to Northern District Rule 10). In contrast, the opinions of the Ninth Circuit and the Hawaii district court make plain that Katherine D. needed care that was intermittent, not constant, *see* 531 F.Supp. at 520, and which did not require as much expertise, *see* 727 F.2d at 815 n. 6 ("It is indisputable that even a lay person could have been trained to provide the services Katherine required.").

We conclude that, in all the circumstances, the district court gave proper effect to the statutory scheme in balancing the interests of the parties. The judgment of the district court is affirmed.

Opinion of the
District Court for the Northern District of New York

Melissa DETSEL, an infant by her mother and next friend, Mary Jo DETSEL, Plaintiff,

v.

BOARD OF EDUCATION OF the AUBURN ENLARGED CITY SCHOOL DISTRICT, Peter Kachris, individually and as Superintendent of the Auburn Enlarged City School District, Gordon Ambach, Commissioner of the New York State Education Department, Stephen Bandas, individually and as Commissioner of the Cayuga County Department of Social Services, and Cesar Perales, individually and as Commissioner of the New York State Department of Social Services, Defendants.

No. 84-CV-1353.

United States District Court,
N.D. New York.

June 23, 1986.

Mother of handicapped student who attended special education class brought action under Education of All Handicapped Children Act seeking to compel school district and board of education to provide student with constant nursing care while she attended public school. The District Court, McCurn, J., held that Education of All Handicapped Children Act did not require school district and board of education to provide severely physically disabled child with constant in-school nursing care.

Dismissed.

Legal Services of Cent. New York, Inc., Syracuse, N.Y., for plaintiff; Joanne Hunt Piersma, of counsel.

Treman & Clynes, Office of Harris, Beach, Wilcox, Rubin and Levey, Ithaca, N.Y., for defendants Bd. of Educ. of Auburn City School Dist. and Peter Kachris; Edward C. Hooks, of counsel.

Robert D. Stone, Albany, N.Y., for defendant Ambach; James H. Whitney, of counsel.

MEMORANDUM-DECISION AND ORDER

McCURN, District Judge.

1. *Background*

The plaintiff, Mary Jo Detsel, has brought this action on behalf of her daughter Melissa, a handicapped student who attends a special education class at the Seward Elementary School in Auburn, seeking relief under the Education of All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.* (EAHCA); section 504 of the Rehabilitation Act, 29 U.S.C. § 794; and 42 U.S.C. § 1983. The plaintiff asks for declaratory and injunctive relief compelling the defendants Board of Education of the Auburn Enlarged City School District (Board of Education); Peter Kachris, Superintendent of the Auburn Enlarged City School District; and, Gordon Ambach, Commissioner of the New York State Education Department; to provide Melissa with constant nursing care while she attends public school.

Melissa is a seven-year-old child who suffers from severe physical disabilities. In order to live, she requires constant respirator assistance and a continuous supply of forty percent oxygen. All of the parties to the instant action agree that Melissa's condition requires constant vigilance by an individual trained to monitor her health. The present controversy concerns just who must provide her with this care.

Formerly, the Cayuga County Department of Social Services had provided Melissa with the services of one nurse from 7:00 a.m. until 3:00 p.m. and of a second nurse from 11:00 p.m. until 7:00 a.m. However, the Department of Social Services refused to continue paying for the services of the first nurse who accompanied Melissa to school when she began attending kindergarten in 1983. Melissa enrolled in a BOCES Option III multiply handicapped class at the Seward Elementary School upon the recommendation of the school district's Committee on the Handicapped (COH) which had classified her as "other health impaired." At that time, the Board of Education protested that it was not obligated to compensate the nurse employed to

render Melissa assistance during school hours, but it did agree to pay her until the plaintiff ascertained whether other sources of payment were available.

Upon notification by the school district that it would not shoulder the expense of extensive in-school nursing care, plaintiff requested an impartial hearing pursaunt to 20 U.S.C. § 1415(b) and the N.Y.Educ. Law § 4404(1) to review this decision. On December 14, 1984, the Hearing Officer found that the disputed nursing care did constitute "related services" within the meaning of the EAHCA. Consequently, the Hearing Officer determined that the Board of Education was indeed obligated to provide and pay for these services. The Board of Education appealed this determination. By a decision dated February 25, 1985, the New York State Commissioner of Education, Gordon Ambach, reversed the Hearing Officer's order directing the school district to "provide a suitably trained person to attend to [Melissa's] needs while [attending] a special education class." Decision of Hearing Officer, Marc Reitz, Ex. A, Defendant Ambach's Submitted Record of Appeal; Decision of New York State Commissioner of Education, Ex. F, Defendant Ambach's Record of Appeal, at p. 1. The Commissioner found that the services sought by the plaintiff were not "related services" within the meaning of the EAHCA. The plaintiff now seeks judicial review of the Commissioner's decision.

2. *Discussion*

A. *Education of All Handicapped Children Act (EAHCA).*

The Education of All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.*, creates a comprehensive scheme for assuring that handicapped children receive a "free appropriate public education." 20 U.S.C. § 1401. A "free appropriate public education" includes "special education" and "related services." No state or local educational agency may receive federal funding unless it provides the handicapped with this opportunity. 20 U.S.C. § 1412(1). An individualized education program (IEP) must be developed for each handicapped child which describes the

educational needs of the child and the specially designed instruction and related services to be utilized in meeting those needs. § 1401(19). In addition, the EAHCA imposes detailed procedural requirements upon States receiving federal funds in accordance with the provisions of the Act. A parent aggrieved by the decision of a state educational agency may commence an action in either state or federal court when the disputed determination relates to the education and evaluation of the child. §§ 1415(b), 1415(e).

In accordance with the foregoing mandates, the school district's COH studied Melissa's background and developed an IEP. As noted hereinbefore, the COH recommended that she be classified as "other health impaired" and placed in a special education class for the multiply handicapped. The suggested IEP listed the particular therapies or "related services" to be rendered in connection with Melissa's educational program, including speech and language therapy, physical therapy, occupational therapy, adaptive physical education, and "*appropriate school health services.*" *See* August 29, 1983, COH Recommendation to the Board of Education, Defendant Ambach's Submitted Record of Appeal, Ex. C. The plan, however, failed to identify the specific "health support services" needed. The only question before the court is the extent to which "school health support services" are required by the EAHCA. As already noted, the Hearing Officer determined that the extensive medical care required by Melissa was encompassed within the term "related services" as set forth in the EAHCA whereas the Commissioner concluded it was not.

B. *Related Services.*

A "free appropriate public education" includes "special education and related services." § 1401(18). These related services include:

> [t]ransportation, and such developmental, corrective, and *other supportive services* (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and *medical* and counseling *services*,

> *expect that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist the handicapped child to benefit from special education,* and includ[e] the early identification and assessment of handicapping conditions in children. (emphasis added)

20 U.S.C. § 1401(17).

The Regulations, promulgated by the Department of Education, provide additional assistance in delineating the scope of the term "related services." For example, health services provided by a "school nurse or other qualified person" are specifically denoted as "related services." 34 C.F.R. §§ 300.13(a), 300.13(b)(10). Medical services are restricted, as in the statute, to those services rendered for diagnostic or evaluation purposes, and the regulations further restrict allowable medical services to those performed by a licensed physician. 34 C.F.R. §§ 300.13(a), 300.13(b)(4). Consequently, under the Regulations, therapeutic services rendered by a school nurse or "other qualified person" could qualify as "related services," but similar services performed by a licensed physician would be excluded as non-qualifying "medical services." *See Irving Independent School District v. Tatro*, 468 U.S. 883, 104 S.Ct. 3371, 3377, 82 L.Ed.2d 664 (1984). These regulations are entitled to deference. *Id.*

In the instant action, the plaintiff avers that the extensive medical attention required by her daughter while in school qualifies as a "related service." An examination of the record, including the testimony of the medical personnel responsible for Melissa's care, reveals that while in school, Melissa's nurse must carry out several procedures. First, she must check Melissa's vital signs and administer medication through a tube to the child's jejunum. Moreover, she must perform a procedure known as a "P, D and C" which calls for the ingestion of saline solution by the child into her lungs; the nurse subsequently strikes her about the lungs for four minutes and then suctions out any mucus collected in her lungs. Also, the individual who accompanies Melissa must be prepared to perform cardio-pulmonary resuscitation because of complications arising from a tracheotomy.

Furthermore, Melissa is likely to suffer from respiratory distress which has been described as a life-threatening condition by her doctor. The school physician has testified that the foregoing procedures would require the services of a licensed practical nurse (LPN) or a registered nurse. Melissa's own physician has testified that the services of a school nurse would be inadequate. *See* Exs. A, B, C, and D, Defendant Ambach's Motion Papers.

The sole issues before the court are whether these services are mandated by the EAHCA as "supportive services . . . required to assist a handicapped child to benefit from special education," whether these services constitute "health services" to be provided by a school nurse or "other qualified person," or whether the foregoing services must be excluded from the definition of related services as "medical services" required for a purpose other than diagnosis or evaluation.

Before addressing the merits of the case, the court feels constrained to discuss the appropriate standard of judicial review.

C. *Standard of Judicial Review.*

The EAHCA permits an aggrieved parent to bring an action in district court. In reviewing the decision of the state educational agency,

> "[t]he court shall review the records of the administrative proceeding, shall hear additional evidence at the request of a party, and basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."

20 U.S.C. § 1415(e)(2); *Burlington School Committee v. Department of Education,* 471 U.S. 359, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985). On the basis of the record before it, the court finds that the procedural requirements imposed by the act have been observed; therefore, the court need only determine whether Melissa has been denied access to the State's educational system. In fact, we "are explicitly cautioned not to

impose a particular substantive educational standard on a State or to require equality of opportunity for handicapped children in education." *Karl v. Board of Education of Geneseo C. School District*, 736 F.2d 873, 876 (2d Cir. 1984) (citing *Board of Education v. Rowley*, 458 U.S. 176, 191-203, 102 S.Ct. 3034, 3043-3049, 73 L.Ed.2d 690); *accord Council for the Hearing Impaired v. Ambach*, 610 F.Supp. 1051 (E.D.N.Y. 1985). Consequently, the court must determine whether the services enumerated above qualify as "supportive services" necessary for Melissa to "benefit from instruction." *See Rowley*, 458 U.S. 176, 102 S.Ct. 3034. If they are, then the school district and the board of education must provide and pay for them unless they fall within the exclusion for therapeutic medical services.

D. *EAHCA Claim – Irving Independent School District v. Tatro Decision: Supportive Services or Medical Services?*

The defendants have moved for summary judgment asking the court to hold that the medical care in question does not constitute a "related service" within the meaning of the EAHCA. It is their position that although the disputed services do not necessarily entail the presence of a physician, they are essentially medical in nature, and, therefore, must be excluded under § 1401(17) as medical services of a therapeutic nature. The evidence before the court indicates that the care required by Melissa should be administered by a LPN or registered nurse and that the availability of a school nurse is inadequate. The defendants urge this court to ignore the technical distinction in the Regulations which would exclude therapeutic services when performed by a physician but would not exclude services of this type when performed by a school nurse or other qualified person. Essentially, the defendants' argument is that the question of whether a supportive service is a medical service is a matter of degree. They ask the court to consider the type of service required as the crucial element in determining which category encompasses it, not the status of the person performing the task.

Plaintiff, on the other hand, cross-moves for summary judgment, and asks the court to hold that, as a matter of law, the

disputed services constitute "supportive services ... required to assist [Melissa] to benefit from special education." Plaintiff claims that because the procedures required may be performed by a qualified person, other than a physician, they constitute "school health services," and do not fall within the exclusion for therapeutic medical services enunciated in the EAHCA and the regulations promulgated thereto. In contrast to the defendants' argument, the plaintiff focuses entirely on the qualifications of the person performing the service and rejects any distinction based upon the character of the service.

In the leading case of *Irving Independent School District v. Tatro*, 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984), the Supreme Court construed the EAHCA and its implementing regulations. In *Tatro*, the Court held that the provision of clean intermittent catheterization (CIC) was a "supportive service" within the terms of the Act. In that case, petitioner was an eight-year-old child born with spina bifida. The child suffered from speech impairments and a bladder dysfunction which required her to be catheterized every four hours in order to avoid renal injury. The procedure was described as a simple one which the child would soon be able to perform herself. Consequently, the Court ruled that the CIC was indeed a "supportive service ... required to assist a handicapped child to benefit from special education." *Id.*, 104 S.Ct. at 3376. The Court also determined that the provision of CIC did not constitute an excluded medical service. Accordingly, the inquiry of this court must be two-fold: first, do the services in question qualify as "supportive services" and second, do they fall within the "medical services" exclusion?

In *Tatro*, the Supreme Court analogized "supportive services" to services which enable a child to remain at school during the day. *Id.* at 3377. Such services provide the child with meaningful access to the education envisioned by Congress. *Id.* The CIC was characterized as a service which was "no less related to the effort to educate than services that enable[d] the child to reach, enter, or exit the school." *Id.; see also Tokarcik v. Forest Hills School School District*, 665 F.2d 443 (3d Cir. 1981) *cert. denied sub nom Scanlon v. Tokarcik*, 458 U.S. 1121, 102 S.Ct.

3508, 73 L.Ed.2d 1383 (1982) (finding CIC a related service); *State of Hawaii Department of Education v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983), *cert. denied*, —U.S.—, 105 S.Ct. 2360, 86 L.Ed.2d 260 (1985) (finding repositioning of suction tube in child's throat a related service). In the case at bar, provision of the disputed services would undoubtedly enable Melissa to attend school during the day. The parties admit that without this attention, Melissa must receive only in-home instruction. However, it does not necessarily follow that because Melissa can attend school only with the assistance of these services, they must be provided by the school board.

The instant case is decidedly different from the situation presented in *Tatro*. The care essential for Melissa's well-being is complicated and requires the skill of trained health professionals. In its analysis, the Supreme Court recognized that although meaningful access to education must be afforded handicapped children, medical services which would entail great expense are not required. In construing the "medical services" exclusion, the Court determined that the Secretary of Education had reasonably interpreted § 1401(17) by concluding that Congress had intended to "spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence," and upheld the limitation of the "medical services" exclusion to the services of a physician or hospital which, it noted, were far more expensive than school nursing services. The Court found, therefore, that the administration of CIC was a permissible school nursing service.

It is clear that the Supreme Court considered the extent and nature of the service performed in the *Tatro* decision. Unlike CIC, the services required by Melissa are extensive. This is not a simple procedure which the child may perform herself. Constant monitoring is required in order to protect Melissa's very life. The record indicates that the medical attention required by Melissa is beyond the competence of a school nurse. A specially trained individual is required, preferably a health professional. The Supreme Court, in *Tatro*, reasoned that the regulations had permissibly interpreted § 1401(17) in providing that school

nursing services did not fall within the medical services exclusion. In so doing, the Court stated that Congress could well have decided to exclude costly and complicated services. *Id.*, 104 S.Ct. at 3778. Indeed, the Court noted that "children with serious medical needs are still entitled to an education. For example, the Act specifically includes instruction in hospitals and at home within the definition of 'special education.' " *Id.* at n.11. This dictum is in line with the Court's earlier decision in *Rowley* wherein it held that Congress did not intend to "maximize each handicapped child's potential." *Id.*, 458 U.S. at 199, 102 S.Ct. at 3047 (holding that Act did not require provision of a sign language interpreter for a deaf child enrolled in public school).

In light of the foregoing, the court holds that the EAHCA does not require the defendants school district and board of education to provide a severely physically disabled child with constant, in-school nursing care. As recognized in the *Tatro* decision, the "medical services" exclusion evidences Congress' concern that schools might otherwise be subjected to excessive costs and the burden of health care. On the other hand, simple school nursing services do not similarly burden the schools, and, therefore, are permissible under § 1401(17) of the EAHCA. In the case at bar, the services in question do not fall squarely within the terms of the "medical services" exclusion because they need not be performed by a physician, nor do they qualify as simple school nursing services. *See Tatro* (finding the CIC a simple procedure which did not even require the services of a nurse). The extensive, therapeutic health services sought by the plaintiff on behalf of her daughter more closely resemble the medical services specifically excluded by § 1401(17) of the EAHCA. Even though they do not fulfill the "physician" requirement set forth in 34 C.F.R. 300.13(b)(4), the exclusion of the disputed services is in keeping with its spirit. Furthermore, the *Tatro* decision does not require the provision of all health services, regardless of their magnitude, if performed by one other than a physician. The Supreme Court held only that school nursing services of a simple nature are not excludable as therapeutic "medical services."

For the reasons adduced above, the court grants the defendants' motion for summary judgment dismissing the plaintiff's

claim that the failure to provide the services enumerated hereinbefore constitutes a violation of § 1401(16), (17) and (18) of the EAHCA. Consequently, plaintiff's motion for summary judgment is denied.

E. *Rehabilitation Act and § 1983 Claims.*

The plaintiff's claims brought pursuant to the Rehabilitation Act and 42 U.S.C. § 1983 must be dismissed. The EAHCA constitutes her exclusive form of relief. *See Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984).[1]

F. *Pendent State Claims.*

All pendent state claims asserted by the plaintiff are dismissed.

The complaint in its entirety is dismissed.

IT IS SO ORDERED.

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[1] The court recognizes that *Robinson* left open the question whether such a claim would be precluded by the EAHCA. *Id.* at n. 17. However, the court finds that plaintiff was accorded due process.

Order of this Court Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. A-190

MELISSA DETSEL, BY NEXT FRIEND MARY JO DETSEL,

Applicant,

v.

BOARD OF EDUCATION OF THE AUBURN ENLARGED CITY SCHOOL DISTRICT, ET AL.,

Respondents.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 13, 1987.

/s/ Thurgood Marshall

Associate Justice of the Supreme Court of the United States

Dated this 3rd

day of September, 1987.

Statutory and Regulatory Provisions Involved

STATUTORY AND REGULATORY PROVISIONS

United States Code

Title 20

§ 1401 (17) Definitions.

The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

* * *

§ 1412 (5) Eligibility requirements.

The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

Code of Federal Regulations

Title 34

§ 300.13 Related services.

* * *

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

* * *

(b) The terms used in this definition are defined as follows:

* * *

(4) "Medical services" means services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services.

* * *

(10) "School health services" means services provided by a qualified school nurse or other qualified person.

* * *

Least Restrictive Environment

§ 300.550 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 300.550-300.556.

(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

§ 300.551 Continuum of alternative placements.

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under § 300.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

§ 300.552 Placements.

Each public agency shall insure that:

(a) Each handicapped child's educational placement: (1) Is determined at least annually,

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home;

(b) The various alternative placements included under § 300.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

Comment. Section 300.552 includes some of the main factors which must be considered in determining the extent to which a handicapped child can be educated with children who are not handicapped. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to insure that each handicapped child receives an education which is appropriate to his or her individual needs.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (34 CFR Part 104—Appendix, Paragraph 24) includes several points regarding educational placements or handicapped children which are pertinent to this section:

1. With respect to determining proper placements, the analysis states: "* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs * * * ."

2. With respect to placing a handicapped child in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parent's right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home; and this issue may be raised by the parent under the due process provisions of this subpart.

§ 300.553 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extra-curricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.306 of Subpart C, each public agency shall insure that each handicapped child participates with non-handicapped children in those services and activities to the maximum extent appropriate to the needs of that child.

Comment. Section 300.553 is taken from a new requirement in the final regulations for Section 504 of the Rehabilitation Act of 1973. With respect to this requirement, the analysis of the Section 504 Regulations includes the following statement: "[A new paragraph] specifies that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be

provided opportunities for participation with other children." (34 CFR Part 104—Appendix, Paragraph 24.)

§ 300.554 Children in public or private institutions.

Each State educational agency shall make arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures) as may be necessary to insure that § 300.550 is effectively implemented.

Comment. Under section 612(5)(B) of the statute, the requirement to educate handicapped children with nonhandicapped children also applies to children in public and private institutions or other care facilities. Each State educational agency must insure that each applicable agency and institution in the State implements this requirement. Regardless of other reasons for institutional placement, no child in an institution who is capable of education in a regular public school setting may be denied access to an education in that setting.

§ 300.555 Technical assistance and training activities.

Each State educational agency shall carry out activities to insure that teachers and administrators in all public agencies:

(a) Are fully informed about their responsibilities for implementing § 300.550, and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

§ 300.556 Monitoring activities.

(a) The State educational agency shall carry out activities to insure that § 300.550 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with § 300.550 of this subpart, the State educational agency:

(1) Shall review the public agency's justification for its actions, and

(2) Shall assist in planning and implementing any necessary corrective action.